86 - 1304

No.

In the
Supreme Court of the United States

OCTOBER TERM, 1986

MARSHALL CAIFANO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS

1. Whether petitioner was denied Due Process by the Court of Appeals' failure to have observed the mandate of Title 18 U.S. Code Section 3576 requiring review of the sentence imposed with written findings supporting its determination.

2. Whether trial counsel's failure to seek exclusion of evidence on grounds of collateral estoppel and prejudicial impact so deprived petitioner of ineffective assistance of counsel as to require retrial.

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OPINION BELOW

There are no published opinions in this case. The Memorandum Order of the district court is provided in Exhibit A of the Appendix. The *per curiam* summary affirmance by the Eleventh Circuit Court of Appeals is provided in Exhibit B of the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on November 26, 1986. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. 1254(1).

STATUTES INVOLVED

This case involves Title 18, United States Code, Section 3575—*Dangerous Special Offender,* and Section 3576—*Review of a Dangerous Special Offender Sentence.* The pertinent portions of those statutes are provided in Exhibit C of the Appendix.

RELEVANT CONSTITUTIONAL PROVISIONS

This case involves the Fifth Amendment's Due Process Clause and the Sixth Amendment's guarantee to effective assistance of counsel.

STATEMENT OF THE CASE

In 1979 an indictment was filed in the Southern District of Florida charging petitioner with three offenses. Count One charged that petitioner and others conspired to possess stolen stock certificates and to transport same in interstate commerce. Count Two charged petitioner and another with transporting the same securities from Illinois to Florida; and, Count Five charged petitioner and others with transporting stolen securities from Florida to Texas.

Petitioner alone was tried by a jury sitting at Miami, in the Southern District of Florida. While the jury acquitted petitioner of the offense charged by Count Five, a verdict was not reached on the remaining counts and the trial judge declared a mistrial. Less than a month later, a retrial was held before another jury at West Palm Beach in the Southern District of Florida, which returned a guilty verdict on the remaining counts. Following conviction, the government proceeded against petitioner as a dangerous special offender pursuant to 18 U.S.C. 3575. A sentencing hearing was conducted resulting in the trial court's finding that petitioner was a dangerous special offender. On that finding, petitioner was sentenced to twenty years on each count, the sentences to run concurrently.

Petitioner appealed from his conviction and sentence. On January 26, 1982, the Eleventh Circuit Court of Appeals affirmed the conviction in an unpublished opinion.

Thereafter, petitioner filed a Petition for Habeas Corpus Relief pursuant to Title 18 U.S. Code Section 2255 charging, *inter alia,* (a) that the Eleventh Circuit's failure to review the propriety of the dangerous special offender sentence, as mandated by 18 U.S.C. 3576, denied petitioner due process. Relief was further sought on the basis that petitioner was denied effective assistance of counsel by his trial attorney's (i) failure to have sought exclusion of evidence relating to the offense for which petitioner had been acquitted at the earlier trial, and (ii) failure to have sought exclusion or limitation of evidence detailing petitioner's past record of convictions and incarceration.

Without requiring the government to respond, the District Court summarily denied the 2255 petition, finding that petitioner was entitled to no relief. As to the first issue noted above, the Court observed that the "defendant's prayer for remedy, if any, must have been or must be made to the appellate court or the Supreme Court" See Exhibit A, Appendix.

Petitioner appealed from the order of the District Court to the Eleventh Circuit Court of Appeals which, in a one word *per curiam* order, "affirmed" the District Court's ruling, See Exhibit B, Appendix. An opinion was not issued by the Court of Appeals and petitioner did not seek rehearing before the Appeals Court.

Petitioner prays this Court's review of his conviction and sentence. Petitioner's twenty year sentence as a dangerous special offender violates due process because the Court of Appeals utterly failed to review that sentence on direct appeal as mandated by 18 U.S. C. 3576. That failure deprived petitioner of appellate determination of the following: (a) whether the clear and convinc-

ing standard rather than the preponderance of the evidence standard should be used to prove future dangerousness; and, (b) whether the trial court's sentence of twenty years on both counts without first imposing sentence on the underlying felonies as well as its failure to determine proportionality, constituted error.

Petitioner's conviction offends the Fifth and Sixth Amendments of the Constitution because evidence relating to the offense of which petitioner had been acquitted was improperly admitted at retrial, unchallenged by defense counsel. That conviction was further tained by evidence of petitioner's record of prior convictions and incarceration concerning which trial counsel took no action to exclude or lamit, all to the prejudice of petitioner.

REASONS FOR GRANTING THE WRIT

This case presents significant issues of statutory construction and the duty of defense counsel seek exclusion of *per se* inadmissible evidence. On both issues, there remain conflicts among the Circuit Courts of Appeal.

1. Improper Imposition of Enhanced Sentence

The dangerous special offender statute, 18 U.S.C. 3575, permitted the trial judge to enhance the sentence of a defendant found to be "special offender," [Title 18 U.S.C. Section 3575(e)], who is proven, by a preponderance of the information, to be "dangerous" [Section 3575(f)]. The statute defines "dangerous" as the engagement by the accused in future criminal activity. Section 3575(b) places limitations upon a dangerous special offense sentence; it may not exceed 25 years and it may not be "disproportionate in severity to the maximum term otherwise authorized by law for such felony". An enhanced sentence may only be imposed on a finding that a "period of confinement longer than that provided for such felony is required to protect the public from further criminal activity by the defendant" Section 3575(f).

Because of the potential for unwarranted use and the implicit severity resulting from enhancement, Congress required that such a sentence be subject to appellate review. Title 18 U.S.C. 3576 provides in pertinent part:

> . . . Review of the sentence *shall* include review of whether the procedure employed was lawful, the findings were clearly erroneous, or the sentencing court's discretion was abused. . . . The court of appeals *shall state in writing* the reason for its disposition of the review of the sentence (emphasis added).

Opinions of at least four Circuit Courts of Appeal have held that the "standard of appellate review under [Sec-

tion 3576] is much greater than that normally provided on appeal from sentencing decisions." *United States* v. *Scarborough*, 777 F.2d 175, 179-80 (4th Cir. 1985); *United States* v. *Thornley*, 733 F.2d 970, 971 (1st Cir. 1984); *United States* v. *Felder*, 706 F.2d 135, 137-38 (6th Cir. 1984); *United States* v. *Stewart*, 531 F.2d 326, 332 (6th Cir. 1976); *United States* v. *Soto*, 779 F.2d 558, 562 (9th Cir. 1986).

In contrast, the Eleventh Circuit, although being presented on direct appeal with numerous challenges to petitioner's enhanced sentence, not only failed to review the sentence but also failed to state its written reasons for review. When petitioner, by *Habeas Corpus*, challenged that failure as a denial of due process, the district court stated that his "remedy, if any, must have been or must be made to the appellate court or the Supreme Court". Accordingly, in his appeal from the district court's denial of Habeas Corpus relief, petitioner addressed that omission to the forum which failed to follow the mandate of Section 3576. The request was not considered by the Eleventh Circuit, forcing petitioner to seek enforcement of the legislative mandate in this, his court of last resort.

Proof of future dangerousness by the preponderance of the evidence standard creates a substantial risk of an erroneous deprivation of liberty. In *Addington* v. *Texas*, 441 U.S. 418 (1979), this Court noted that it is almost impossible to predict future dangerousness, See also, *United States* v. *Salerno*, 794 F.2d 64, 72 (2d Cir. 1986), *cert. granted*, 40 CrL 4073 (11/5/86). Because future dangerousness cannot be demonstrated by any standard of proof, preventive detention solely on the basis of anticipated future dangerousness is unconstitutional.

Sprect v. *Patterson*, 386 U.S. 605 (1967), teaches that where an individual is subjected to an enhanced sentence,

the sentencing hearing must be accompanied by "all those safeguards which are fundamental and essential to a fair trial", 386 U.S. at 609-10. While *Sprect* does not dictate the standard of proof to be used in such proceedings, this Court's opinion in *Board of Regents* v. *Roth*, 408 U.S. 564 (1972) requires an evaluation of the following factors in determining what standard is appropriate to a particular proceeding: the private interest, the risk of an erroneous deprivation, the value of additional safeguards and the government's interest.

Certainly, petitioner has a fundamentally important private interest in not being confined beyond the maximum provided by the statutes under which he was convicted. However, the use of the lowest of the three standards of proof to prove future dangerousness (when coupled with the impossibility of *proving* future dangerousness) creates a substantial risk that petitioner, although not dangerous,[1] will be unduly deprived of his liberty. A higher standard of proof would reduce that risk and would mitigate the uncertainty inherent in determinations centered about anticipated conduct. Such a standard would also serve to preserve the government's interests to protect society from dangerous individuals and to insulate individuals not found to be dangerous from enhanced incarceration.

This Court has ruled that requiring future dangerousness to be demonstrated by proof beyond a reasonable doubt presents an insurmountable hurdle (*Addington*, 441

[1] At the time of his sentencing hearing petitioner was 69 years of ago, and in failing health. There was no evidence presented at the hearing that petitioner, for a period of five years prior to the hearing, had been involved in any criminal activity or had associated with known criminals.

U.S. at 429-30); however, the clear and convincing evidence standard would serve to promote the interests of the individual and the government.[2] The latter standard is used to determine dangerousness in other contexts, to wit: mental patients, *Addington*; sex offenders, *Hollis* v. *Smith*, 571 F.2d 685 (2d Cir. 1978); bail pending appeal, 18 U.S.C. 3143(b). *A fortiori*, in petitioner's case where a finding of dangerousness is final, the implementation of the higher standard is required.[3]

By definition, the enhanced sentencing procedure requires a judge to first sentence a defendant on the underlying felony, and only then to enhance that sentence based on specific criteria. It is that very process which differentiates enhancement from the usual sentencing proceeding. In the case of a sentence to be imposed under Section 3575(b), the argument for such a procedure is made even stronger by the statutory requirements that the enhancement not be "disproportionate in severity" to a sen-

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[2] Although virtually every circuit in the country has held that the reasonable doubt standard is not appropriate for dso hearings, *see e.g.*, *United States* v. *Inendino*, 604 F.2d 458 (7th Cir. 1979), only one circuit has rejected the clear and convincing standard. *See United States* v. *Schell*, 692 F.2d 672 (10th Cir. 1982), where Judge McKay, in a strongly worded dissent, recognized that the clear and convincing standard would protect the interests of both the individual and the government, 692 F2d at 679-84.

[3] In *McMillan* v. *Pennsylvania*, 91 LEd 2d 67 (1986), a majority of this Court upheld a statute which provided for an enhanced sentence upon proof by a preponderance of the evidence that the defendant committed the felony with a firearm. The instant case presents the factual determination of an elusive and subjective concept—future dangerousness—as opposed to the objective finding as to whether or not a weapon was used in the commission of a felony.

tence authorized by the underlying felony and by the additional safeguard requiring appellate review the proportionality of the sentence imposed. A proportionality review is virtually impossible without a sentence on the underlying felony. See, *United States* v. *Calabrese*, 755 F.2d 302, 305 (2d Cir. 1985); *United States* v. *Scarborough*, 777 F.2d 175, 176 (4th Cir. 1985); *United States* v. *Soto*, 779 F.2d 558, 559 (9th Cir. 1986), where sentences enhanced in the proper manner were upheld.

In petitioner's case, the sentencing judge failed to impose a sentence on the underlying felony. Instead, he simply sentenced petitioner to concurrent terms of twenty years on each of two counts. Since the maximum sentence on Count One was five years while the maximum sentence on Count Two was ten years, it is clear that the court did not conduct a proportionality determination. Not only is the sentence contrary to express mandate of the statute, it is also ambiguous and illegal[4].

The court of appeals is required, by the mandatory language of title 18 U.S.C. 3576, to review the dangerous special offender sentence. Petitioner's challenges to his sentence are not frivolous. The Eleventh Circuit Court of Appeals should have reviewed them on direct appeal, stating the results of its findings in writing. Its failure to have done so on appeal and its continued avoidance of the issue as raised by Habeas Corpus has denied petitioner due process of law.

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[4] Although the Eleventh Circuit did not review petitioner's sentence, had it done so and determined that it had been improperly imposed, there would not have been any sentence remaining for petitioner to serve. This is yet another reason why a sentencing court must first sentence on the underlying felony before enhancing it.

2. Denial of Effective Assistance of Counsel

In seeking *Habeas Corpus* relief, petitioner has advanced the following substantial omissions on the part of his trial counsel as evidence of his constitutionally defective performance:

a) trial counsel took no action to exclude or limit government evidence at retrial which related to the charge of which petitioner had been acquitted; this, despite the fact that such evidence was obviously inadmissible under the Doctrine of Collateral Estoppel;

b) trial counsel failed to exclude evidence of petitioner's prior incarceration and, when such evidence was admitted during the government's case-in-chief, counsel failed to seek mistrial, despite the obvious prejudicial impact of such evidence upon the trier of fact; and,

c) trial counsel failed to seek exclusion or limitation of evidence detailing petitioner's prior convictions on the basis of their staleness and prejudicial impact, despite the fact that counsel had notice of the intended use of such evidence by the government.

The foregoing omissions were not addressed by the Court of Appeals in its order of affirmance and were characterized by the District Court as "tactical decisions of counsel".

In *Strickland* v. *Washington*, 466 U.S. 668 (1984), this Court held that in order to demonstrate ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the inadequate performance prejudiced the defense, 104 S. Ct. at 2066. In the instant case, by not seeking to exclude evidence relating criminal conduct of which petitioner had been

acquitted and evidence of petitioner's prior convictions and incarceration, trial counsel's performance was woefully deficient.

It is fundamental that the government is prohibited under the doctrine of collateral estoppel from relitigating evidence resolved against it at a prior trial. *Ashe* v. *Swenson,* 397 U.S. 436 (1970). Collateral estoppel protects a defendant from redetermination of evidentiary facts as well as ultimate facts, *Wingate* v. *Wainwright,* 464 F.2d 209, 213 (5th Cir. 1972). The doctrine has been applied in cases where the jury has acquitted a defendant of a substantive offense but has failed to reach a verdict on a conspiracy offense. In all such instances, the government is precluded at retrial from reintroducing evidence of an offense which has resulted in an acquittal; See e.g., *Yawn* v. *United States,* 244 F.2d 235 (5th Cir. 1977); *United States* v. *Mespoulede,* 597 F.2d 329 (2d Cir. 1979); *United States* v. *Gornto,* 792 F.2d 1028 (11th Cir. 1986). Introduction of such evidence is inherently prejudicial and inadmissible for any purpose. Its admission without challenge by trial counsel cannot be dismissed as an acceptable "tactical decision".

Evidence of defendant's prior incarceration during the prosecution's case-in-chief has been held to be so prejudicial as to constitute *per se* reversible error. *Tallo* v. *United States,* 344 F.2d 467 (1st Cir. 1967); *United States* v. *Smith,* 403 F.2d 74 (6th Cir. 1968); *United States* v. *Gray,* 468 F.2d 257 (3d Cir. 1972); *United States* v. *Sostarich,* 684 F.2d 606 (8th Cir. 1982).

In *Michelson* v. *United States,* 335 U.S. 469 (1948), this Court held that testimony regarding a defendant's prior record is not admissible against him in the prosecution's case-in-chief, 335 U.S. at 476. Accord, *Marshall* v.

United States, 360 U.S. 310 (1959). This prohibition precludes inquiry concerning a defendant's prior convictions and the details thereof (Rule 609, Federal Rules of Evidence), *United States* v. *Tumblin*, 551 F.2d 1001, 1004 (5th Cir. 1977).

In petitioner's case, defense counsel not only failed to seek exclusion of the evidence relating to and detailing the offense of which he had earlier been acquitted; but, when the government's principal witness testified to petitioner's incarceration in the Atlanta Federal Penitentiary, counsel not only failed to move for a mistrial, he underscored the prejudicial impact of that testimony by cross examining that witness concerning that incarceration. Additionally, when petitioner was called to testify in his defense, his counsel questioned petitioner repeatedly concerning the details of his earlier convictions. Clearly, these errors and omissions do not fall within "the wide range of reasonable professional assistance," *Strickland*, 104 S.Ct. at 2066.

Petitioner was obviously prejudiced by his counsel's deficient performance. Primarily, the jury was allowed to consider detailed evidence of the transportation of securities from Florida to Texas and evidence of petitioner's prior incarceration and convictions simply because that evidence was not challenged by defense counsel. The objectionable evidence served only to taint the jury's consideration of the evidence relevant to the charges then being tried and to undermine petitioner's presumption of innocence. And, because counsel failed to object to the introduction of such improper evidence, the issues were not preserved for review. A seasoned practitioner may never simply allow the admission of clearly objectionable and highly prejudicial evidence as trial strategy. Neither

may his failure to challenge same be excused as acceptable "tactical decisions."

Circuit Courts of Appeal have held such errors and omissions as those advanced by this petition to constitute ineffective assistance of counsel, *Lyons* v. *McCotter,* 770 F.2d 529 (5th Cir. 1985); *Pickens* v. *Lockhart,* 714 F.2d 1455 (8th Cir. 1983), *Gray* v. *Greer,* 800 F.2d 644 (7th Cir. 1986), *after remand,* 39 CrL 4100 (7/2/86). Yet, petitioner's pleas for relief have thus far been ignored or simply dismissed as insignificant. Only this Court can rectify the constitutional deficiencies attendant to petitioner's conviction to the end that the Sixth Amendment's guarantee to effective assistance of counsel be meaningful to petitioner whose trust in the adequacy of trial counsel was obviously misplaced.

CONCLUSION

This Court's intervention is sought in order to clarify the important issues raised, to resolve the existing conflicts among the Circuits on matters addressed by this Petition and to provide necessary guidance to lower courts concerning standards to be utilized in sentence enhancement proceedings. Thousands of people are sentenced each year under a variety of statutory provisions permitting enhancement. A definitive ruling by this Court would ensure consistency in the procedure to be followed and the standard to be applied in this important area.

This case presents serious deprivations of the constitutional guarantee to effective assistance of counsel, a guarantee which was not afforded petitioner. Only this Court may correct that miscarriage. For the foregoing reasons, petitioner prays that a writ of certiorari issue to review the judgment of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

EXHIBIT A—District Court's Memorandum Order

EXHIBIT B—Eleventh Circuit's Summary Affirmance

EXHIBIT C—Statutes Involved

Title 18 U.S. Code § 3575

Title 18 U.S. Code § 3576

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 79-129-Cr-Paine
(86-393-Civ-Paine)

UNITED STATES OF AMERICA)
v.)
MARSHALL CAIFANO,)
Defendant.)

ORDER DENYING PETITION TO VACATE AND SET ASIDE SENTENCE PURSUANT TO 28 U.S.C. §2255

Before the Court is the petition of the defendant, Marshall Caifano, for relief pursuant to 28 U.S.C. §2255. In accordance with Rule 4 of the rules governing §2255 petitions or motions, the defendant's submission has been examined by the undersigned trial judge together with all files, records, transcripts and correspondence relating to the judgment under attack. I find that it plainly appears from the face of the motion, the memorandum in support thereof and the record of prior proceedings that the movant is not entitled to relief. Each of the grounds advanced by the defendant have been examined and the relevant facts and law reviewed in connection therewith.

Ground One of the defendant's motion asserts denial of effective assistance of counsel. Four separate allegations of ineffective assistance are stated. The first of these asserts that trial counsel failed to move under Federal Rule of Criminal Procedure 12(b)(2) to dismiss for duplicity Count I of the indictment which charged, it

is asserted, two conspiracies in a single count. A review of the record does not lead to the conclusion that two conspiracies existed. There can be no conclusion of duplicity because of the admission of evidence showing that separate acts were carried out in order to consumate the conspiracy. A conspiracy to do two unlawful acts is still a single conspiracy. The second assertion of ineffective assistance of counsel is that counsel failed to move to prohibit in the second trial evidence presented at the first trial to prove Count V of the indictment for which the defendant was acquitted in the first trial. Evidence of the acts charged in Count V of the indictment admitted in support of the conspiracy charged in Count I do not constitute a violation of the doctrine of collateral estoppel and/or ineffective assistance of counsel for much the same reasons as heretofore stated. The third assertion of ineffective assistance of counsel is that the trial counsel failed to move to exclude, under Federal Rule of Evidence 609(a)(1) and 609(b) evidence of the defendant's prior convictions and evidence of his incarceration in the Atlanta Penitentiary. These rules have been examined in the light of the evidence which was offered and we find no violation of them nor any quarrel with the tactical decision of counsel to put the defendant on the witness stand. The fourth assertion of ineffective assistance of counsel is that defense counsel failed to request an instruction of "causing" the transportation of securities. However, the jury was adequately instructed with respect to the elements of each of the offenses of which he was convicted. We find no merit in this assertion.

The second ground of the §2255 motion asserts that the sentence imposed on the defendant violated his constitutional rights to due process. The requirements of

18 U.S.C. §3575 *et seq.* were met by the evidence in this case and in the post trial hearing which was held as to the applicability of the dangerous special offender statute. Therefore, the first two subsections of ground two which are advanced by the defendant are found to be without merit. The third assertion of violation of constitutional right to due process is that the Court's sentence is illegal, ambigious and not in conformity with §3575 because it exceeds the statutory maximum and amounts to double enhancement. Again, the provisions of the section in question were carefully followed and no ambiguity in this sentence, as stated, is apparent. The fourth assertion of failure of constitutional due process is that the appellate court review of the dangerous special offender sentence fails to state its reasons in writing for the disposition on review. 18 U.S.C. 3576. The record before this Court reveals no failure of constitutional due process resulting from the appellate court review of the enhanced sentence. The defendant's prayer for a remedy, if any, must have been or must be addressed to the appellate court or to the Supreme Court.

Finding no merit in the petition pursuant to 28 U.S.C. §2255, it is

ORDERED and ADJUDGED that the motion be and the same is hereby denied.

DONE and ORDERED at West Palm Beach, Florida this 28th day of April, 1986.

/s/ James L. Paine
United States District Judge

cc: U.S. Attorney
Richard B. Caifano, Esq.

EXHIBIT B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-5345

D.C. Docket No. 86-393

MARSHALL CAIFANO,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(November 26, 1986)

Before KRAVITCH and HATCHETT, Circuit Judges, and MORGAN, Senior Circuit Judge.

PER CURIAM: AFFIRMED. See Circuit Rule 25.

Judgment Entered: November 26, 1986
For the Court: Miguel J. Cortez, Clerk

By: /s/ David Maland
Chief Deputy Clerk

ISSUED AS MANDATE: DEC 18 1986

EXHIBIT C

STATUTES INVOLVED

Title 18 U.S. Code

§ 3575. Increased sentence for dangerous special offenders

(a) Whenever an attorney charged with the prosecution of a defendant in a court of the United States for an alleged felony committed when the defendant was over the age of twenty-one years has reason to believe that the defendant is a dangerous special offender such attorney, a reasonable time before trial or acceptance by the court of a plea of guilty or nolo contendere, may sign and file with the court, and may amend, a notice (1) specifying that the defendant is a dangerous special offender who upon conviction for such felony is subject to the imposition of a sentence under subsection (b) of this section, and (2) setting out with particularity the reasons why such attorney believes the defendant to be a dangerous special offender. In no case shall the fact that the defendant is alleged to be a dangerous special offender be an issue upon the trial of such felony, be disclosed to the jury, or be disclosed before any plea of guilty or nolo contendere or verdict or finding of guilty to the presiding judge without the consent of the parties. If the court finds that the filing of the notice as a public record may prejudice fair consideration of a pending criminal matter, it may order the notice sealed and the notice shall not be subject to subpena or public inspection during the pendency of such criminal matter, except on order of the court, but shall be subject to inspection by the defendant alleged to be a dangerous special offender and his counsel.

(b) Upon any plea of guilty or nolo contendere or verdict or finding of guilty of the defendant of such felony, a hearing shall be held before sentence is imposed, by the court sitting without a jury. The court shall fix a time for the hearing, and notice thereof shall be given to the defendant and the United States at least ten days prior thereto. The court shall permit the United States and counsel for the defendant, or the defendant if he is not represented by counsel, to inspect the presentence report sufficiently prior to the hearing as to afford a reasonable opportunity for verification. In extraordinary cases, the court may withhold material not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, any source of information obtained on a promise of confidentiality, and material previously disclosed in open court. A court withholding all or part of a presentence report shall inform the parties of its action and place in the record the reasons therefor. The court may require parties inspecting all or part of a presentence report to give notice of any part thereof intended to be controverted. In connection with the hearing, the defendant and the United States shall be entitled to assistance of counsel, compulsory process, and cross-examination of such witnesses as appear at the hearing. A duly authenticated copy of a former judgment or commitment shall be prima facie evidence of such former judgment or commitment. If it appears by a preponderance of the information, including information submitted during the trial of such felony and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special offender, the court shall sentence the defendant to imprisonment for an appropri-

ate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony. Otherwise it shall sentence the defendant in accordance with the law prescribing penalties for such felony. The court shall place in the record its findings, including an identification of the information relied upon in making such findings, and its reasons for the sentence imposed.

(c) This section shall not prevent the imposition and execution of a sentence of death or of imprisonment for life or for a term exceeding twenty-five years upon any person convicted of an offense so punishable.

(d) Notwithstanding any other provision of this section, the court shall not sentence a dangerous special offender to less than any mandatory minimum penalty prescribed by law for such felony. This section shall not be construed as creating any mandatory minimum penalty.

(e) A defendant is a special offender for purposes of this section if—

(1) the defendant has previously been convicted in courts of the United States, a State, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof for two or more offenses committed on occasions different from one another and from such felony and punishable in such courts by death or imprisonment in excess of one year, for one or more of such convictions the defendant has been imprisoned prior to the commission of such felony, and less than five years have elapsed between the commission of such felony and either the defendant's

release, on parole or otherwise, from imprisonment for one such conviction or his commission of the last such previous offense or another offense punishable by death or imprisonment in excess of one year under applicable laws of the United States, a State, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency or instrumentality thereof; or

(2) the defendant committed such felony as part of a pattern of conduct which was criminal under applicable laws of any jurisdiction, which constituted a substantial source of his income, and in which he manifested special skill or expertise; or

(3) such felony was, or the defendant committed such felony in furtherance of, a conspiracy with three or more other persons to engage in a pattern of conduct criminal under applicable laws of any jurisdiction, and the defendant did, or agreed that he would, initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or conduct, or give or receive a bribe or use force as all or part of such conduct.

A conviction shown on direct or collateral review or at the hearing to be invalid or for which the defendant has been pardoned on the ground of innocence shall be disregarded for purposes of paragraph (1) of this subsection. In support of findings under paragraph (2) of this subsection, it may be shown that the defendant has had in his own name or under his control income or property not explained as derived from a source other than such conduct. For purposes of paragraph (2) of this subsection, a substantial source of income means a source of income which for any period of one year or more exceeds

the minimum wage, determined on the basis of a forty-hour week and a fifty-week year, without reference to exceptions, under section 6(a)(1) of the Fair Labor Standards Act of 1938 (52 Stat. 1602, as amended 80 Stat. 838), and as hereafter amended, for an employee engaged in commerce or in the production of goods for commerce, and which for the same period exceeds fifty percent of the defendant's declared adjusted gross income under section 62 of the Internal Revenue Act of 1954 (68A Stat. 17, as amended 83 Stat. 655), and as hereafter amended. For purposes of paragraph (2) of this subsection, special skill or expertise in criminal conduct includes unusual knowledge, judgment or ability, including manual dexterity, facilitating the initiation, organizing, planning, financing, direction, management, supervision, execution or concealment of criminal conduct, the enlistment of accomplices in such conduct, the escape from detection or apprehension for such conduct, or the disposition of the fruits or proceeds of such conduct. For purposes of paragraphs (2) and (3) of this subsection, criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

(f) A defendant is dangerous for purposes of this section if a period of confinement longer than that provided for such felony is required for the protection of the public from further criminal conduct by the defendant.

(g) The time for taking an appeal from a conviction for which sentence is imposed after proceedings under this section shall be measured from imposition of the original sentence.

Title 18 U.S. Code

§ 3576. Review of sentence

With respect to the imposition, correction, or reduction of a sentence after proceedings under section 3575 of this chapter, a review of the sentence on the record of the sentencing court may be taken by the defendant or the United States to a court of appeals. Any review of the sentence taken by the United States shall be taken at least five days before expiration of the time for taking a review of the sentence or appeal of the conviction by the defendant and shall be diligently prosecuted. The sentencing court may, with or without motion and notice, extend the time for taking a review of the sentence for a period not to exceed thirty days from the expiration of the time otherwise prescribed by law. The court shall not extend the time for taking a review of the sentence by the United States after the time has expired. A court extending the time for taking a review of the sentence by the United States shall extend the time for taking a review of the sentence or appeal of the conviction by the defendant for the same period. The taking of a review of the sentence by the United States shall be deemed the taking of a review of the sentence and an appeal of the conviction by the defendant. Review of the sentence shall include review of whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused. The court of appeals on review of the sentence may, after considering the record, including the entire presentence report, information submitted during the trial of such felony and the sentencing hearing, and the findings and reasons of the sentencing court, affirm the sentence, impose or direct the imposition of any sentence which the sentencing court

could originally have imposed, or remand for further sentencing proceedings and imposition of sentence, except that a sentence may be made more severe only on review of the sentence taken by the United States and after hearing. Failure of the United States to take a review of the imposition of the sentence shall, upon review taken by the United States of the correction or reduction of the sentence, foreclose imposition of a sentence more severe than that previously imposed. Any withdrawal or dismissal of review of the sentence taken by the United States shall foreclose imposition of a sentence more severe than that reviewed but shall not otherwise foreclose the review of the sentence or the appeal of the conviction. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence. Any review of the sentence taken by the United States may be dismissed on a showing of abuse of the right of the United States to take such review.